

FILED

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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GRUPO XTRA OF NEW YORK,
INC.,

Debtor.

No. 04-55199

BAP No. CC-03-01115-MaPaP

STERN HOLDING CORP.; EAGLE
APPAREL GROUP, INC; and MOSES
MARK STERN,

Appellants,

v.

JEFFREY I. GOLDEN, Chapter 7 Trustee
ARIS INDUSTRIES, INC.; ADAMSON
APPAREL, INC.; and ARNOLD SIMON

Appellees.

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

In re: GRUPO XTRA OF NEW YORK,
INC.,

Debtor.

No. 04-55200

BAP No. CC-03-01153-MaPaP

STERN HOLDING CORP.; EAGLE
APPAREL GROUP, INC; and MOSES
MARK STERN,

Appellants,

v.

JEFFREY I. GOLDEN, Chapter 7 Trustee;
ARIS INDUSTRIES, INC.; ADAMSON
APPAREL, INC.; and ARNOLD SIMON,

Appellees.

In re: GRUPO XTRA OF NEW YORK,
INC.,

Debtor.

No. 04-55201

BAP No. CC-03-01162-MaPaP

STERN HOLDING CORP.; EAGLE
APPAREL GROUP, INC.; and MOSES
MARK STERN,

Appellants,

v.

JEFFREY I. GOLDEN, Chapter 7 Trustee;
ARIS INDUSTRIES, INC.; ADAMSON

APPAREL, INC.; and ARNOLD SIMON,

Appellees.

In re: GRUPO XTRA OF NEW YORK,
INC.,

Debtor.

PUEBLA TRADING; PAYLESS OFFICE
PRODUCTS CORP.; J.J. TEXTILES;
CONFECCIONES SEVETEX; and
BORDADOS BALLESTEROS,

Appellants,

v.

JEFFREY I. GOLDEN, Chapter 7 Trustee;
ARIS INDUSTRIES, INC.; ADAMSON
APPAREL, INC.; and ARNOLD SIMON,

Appellees.

No. 04-55267

BAP No. CC-03-01178-MaPaP

In re: GRUPO XTRA OF NEW YORK,
INC.,

Debtor.

PUEBLA TRADING; PAYLESS OFFICE
PRODUCTS CORP.; J.J. TEXTILES;
CONFECCIONES SEVETEX; and

No. 04-55269

BAP No. CC-03-01179-MaPaP

BORDADOS BALLESTEROS,

Appellants,

v.

JEFFREY I. GOLDEN, Chapter 7 Trustee
ARIS INDUSTRIES, INC.; ADAMSON
APPAREL, INC.; and ARNOLD SIMON,

Appellees.

In re: GRUPO XTRA OF NEW YORK,
INC.,

Debtor.

PUEBLA TRADING; PAYLESS OFFICE
PRODUCTS CORP.; J.J. TEXTILES;
CONFECCIONES SEVETEX; and
BORDADOS BALLESTEROS,

Appellants,

v.

JEFFREY I. GOLDEN, Chapter 7 Trustee
ARIS INDUSTRIES, INC.; ADAMSON
APPAREL, INC.; and ARNOLD SIMON,

Appellees.

No. 04-55271

BAP No. CC-03-01180-MaPaP

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Marlar, Pappas, and Perris, Bankruptcy Judges, Presiding

Argued and Submitted
January 9, 2006 — Pasadena, California

Before: SCHROEDER, Chief Judge, LEAVY, Circuit Judge, and SEDWICK,^{**}
District Judge

Appellants appeal from the final decision of the Bankruptcy Appellate Panel (“BAP”) affirming three orders of the bankruptcy court: (1) the April 25, 2002 oral order granting relief from stay to Aris Industries and CIT Group/Commercial Services, and denying the motion of Grupo Xtra to impose sanctions on Aris for violation of the automatic stay; (2) the February 27, 2003 order of the bankruptcy court approving settlement by the trustee of a lawsuit against Aris (“Aris claims”); and (3) the March 7, 2003 order approving settlement by the trustee of a lawsuit against CIT Group/Commercial Services and the transfer to Aris/CIT of certain claims against Mark Stern and companies he controls.¹

^{**} Honorable John W. Sedwick, Chief District Judge, District of Alaska, sitting by designation

¹ The original appeals and the BAP decision included CIT as a party. The controversy between appellants and CIT has been resolved and CIT dismissed as a party to the appeal.

The BAP, after consolidating the appeals, exercising its appellate jurisdiction under 28 U.S.C. §158(b), affirmed all three orders in an unpublished decision. We have jurisdiction under 28 U.S.C. §158(d) and, having consolidated the appeals, affirm.

“This court reviews decisions of the BAP *de novo*, and thus reviews the bankruptcy court's decisions under the same standards used by the BAP.” *Arrow Elecs., Inc. v. Justus (In re Kaypro)*, 218 F.3d 1070, 1073 (9th Cir. 2000). We independently review the bankruptcy courts' rulings, *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1115 (9th Cir. 2000), and give no deference to the decision of the BAP, *Briney v. Burley (In re Burley)*, 738 F.2d 981, 988 (9th Cir.1984). We review a bankruptcy court's legal conclusions *de novo* and its factual findings for clear error. *Gordon v. Hines (In re Hines)*, 147 F.3d 1185, 1187 (9th Cir. 1998). The decision of a bankruptcy court to approve a compromise is reviewed for abuse of discretion. *Martin v. Kane (In re A & C Properties)*, 784 F.2d 1377, 1380 (9th Cir. 1986).

The facts of this case, which are well known to the parties and are extensively set forth in the decision of the BAP, are not repeated here.

Appellants raise several issues directed at the April 25, 2002, oral order and February 27, 2003, order and request that those orders be reversed.² Summarized, the arguments advanced by appellants are: (1) inadequate notice in violation of appellants' Constitutional and statutory due process rights; (2) the bankruptcy court erroneously treated the February 27, 2003 order resolving the Aris claims as a compromise instead of a sale, precluding an overbid; (3) if release of the Aris claims was a compromise, approval was based on an inadequate factual foundation; and (4) the lack of a new notice to all interested parties of the bifurcation of the proposed compromise of the estate's claims against Aris and CIT violated due process.

Appellants did not obtain a stay of the BAP decision. *See* FED. R. BANK. P. 8017. Appellees argue that this failure renders the appeals moot in that certain irreversible actions have occurred in reliance on the BAP decision that renders it impossible for this court to render effective relief. *Focus Media, Inc. v. Nat'l Broadcasting Co. (In re Focus Media, Inc.)*, 378 F.3d 916, 922 (9th Cir.2004). Although that may be, it is unclear on the record before this court that the actions

² In their reply brief appellants also seek reversal of the March 7, 2003 order; arguments raised for the first time in the reply brief are deemed waived. *United States v. Alcan Electrical & Engineering, Inc.* 197 F.3d 1014, 1019 (9th Cir. 1999).

taken could not be unraveled. Therefore, we decline to dismiss the appeals as moot.

We have considered the other arguments raised by the appellants and find them to be without merit. The BAP held that resolution of the Aris claims was a compromise settlement, but irrespective of whether it was a compromise settlement or a sale, since the notice requirements were the same under FED. R. BANK. P. 6004 (sale) and 9019 (compromise), notice was properly given. At oral argument appellants conceded that the initial notice of the Aris/CIT compromise was adequate. Appellants argue that notwithstanding the adequacy of the initial notice, even though no interested party other than Stern appeared at the hearing, notice of the modified proposal had to be given to all interested parties. Appellants were unable to cite any authority for their position, and our independent research did not reveal any such authority. We are not inclined to adopt such a rule under the facts of this case—where, after proper initial notice, the modification resulted in an increased recovery for the estate.

In affirming the bankruptcy court's February 27, 2003 order, the BAP held that the Aris compromise settlement was proposed in good faith, that the factors enumerated in *A & C Properties* were satisfied, and the bankruptcy court did not abuse its discretion in either approving compromise of the Aris claims or in

adopting the procedure bifurcating the agreement between the trustee and Aris/CIT. It further held that its disposition affirming the February 27 and March 7, 2003 orders rendered the appeals from the April 25, 2002 oral order moot.

We agree with the BAP on all issues. The decision of the Bankruptcy Appellate Panel is affirmed for the reasons stated in its decision.

AFFIRMED.